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Sup. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1386

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALLACE W. BROWN,
Attorney for Petitioner.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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IN THE

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OCTOBER TERM, 1946.

No. .

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John Hancock Mutual Life Insurance Company, a mutual life insurance corporation organized and existing under the laws of the Commonwealth of Massachusetts and located in the City of Boston thereof, respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Judicial Circuit to review a judgment of that Court, entered on March 31, 1947, which reversed [by Judges Learned Hand and Augustus N. Hand (Judge Charles E. Clark concurring in the result but dissenting in respect of the central issue)] a judgment of the District Court of the United States for the District of Connecticut entered for it, on April 18, 1946, in a civil action brought against it by Rhoda S. Gaunt, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased, respondent herein.

A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in accordance with paragraph 1 of Rule 38 of the Revised Rules of this Court.

Summary and Short Statement of the Matter Involved.

The respondent invoked the jurisdiction of the United States District Court for the District of Connecticut on the ground that she was of Waterbury, Connecticut, whereas the petitioner (although admitted to do business in Connecticut) was of Boston, Massachusetts. By her complaint, she sought, *first*, a reformation of an application for life insurance directed to the petitioner and, *second*, assuming reformation were granted, $30,000 in damages for an alleged breach of contract. As to the second, the allegation was that, given a reformed application, the petitioner had issued "a contract of temporary insurance". The respondent claimed, or anyway now claims, as designated beneficiary. The presently relevant facts of record, then, are these:

On August 3, 1943, in Waterbury, one James A. Gaunt, Jr., now deceased, signed an application, directed to the petitioner in Boston, for life insurance. Coincidentally, he made a premium advance, for which he was given a temporary receipt by the soliciting agent, one Morris Kelman, whose authority was confined to solicitation. [The premium advance was put in a local suspense account. It yielded no profit to the petitioner; and it was always subject to recall, along with the application itself, by the applicant.]

Both application and receipt were on the petitioner's standard forms, these forms being on file with the Insurance Commissioner for the State of Connecticut. Also on file with the Insurance Commissioner was the petitioner's standard form of policy which would have been issued had the application won approval, the application becoming a part of that policy.

As to Reformation.

This application, as transmitted to the petitioner and as the petitioner knew it until the respondent had made claim as designated beneficiary, recorded a desire upon his part to have the insurance applied for, if issued, effective from date of issue. Since the applicant was killed while underwriting activities relative to his application were in progress, and since those activities ceased as soon as the petitioner learned of that death, the file appeared closed except for returning the premium advance, which was duly tendered. The respondent, however, came forward with a claim that the application should be reformed to record—and do it retroactively to the day of its execution—a desire upon the applicant's part to have the insurance applied for effective as of the date of completion of Part B thereof. Without such reformation, as her counsel have always been forced to admit, there could be no conceivable cause of action against the petitioner. That claim, consequently, became the first prayer for relief in the complaint. The facts concerning it are briefly set forth as follows:

The application put various questions to Gaunt, the answers to which were to be recorded therein. One of these, *i. e.*, Item 12 of Part A (Part B relating exclusively to physical examination), called upon him to state whether he desired the insurance applied for to be effective as of date of Part B or date of issue of policy. This was to be done by checking either of two boxes provided for the purpose, the upper one for "Date of Part B", the lower one for "Date of issue of Policy". The lower one in fact was checked.

The solicitor, who wrote down all of Gaunt's answers for him, filled in Item 12 after he had signed. Since Gaunt, so the Trial Court found (a finding from which the petitioner did not appeal), had expressed a desire for date of Part B as the effective date, the checking of the lower box of Item 12 was without his knowledge or con-

sent; but, as the Trial Court also found, it "was due to a mutual mistake on the part of Gaunt and Kelman".

This issue of reformation, which the Trial Court declined to resolve for the respondent and which the Circuit Court of Appeals resolved in her favor only as one can imply so much from its monetary judgment in her favor (for its opinion ignores all argument, including citation of applicable and indeed conclusive local authority on the subject), resides not only in the facts thus recited but also in events occurring subsequent to execution of the application. The point here is that, not very long after Gaunt signed the application, he voluntarily conducted himself in such a way as to destroy, in the eyes of any life insurance company, whatever insurability he might otherwise have had; and this conduct he failed to divulge to the petitioner which, as he knew, had his application under consideration. When he met death, he was not only a man who had given up the job he held when he signed his application but he was illegally riding a freight train in the State of South Dakota. [And see *infra*, pp. 21-22].

In the petitioner's view this conduct of Gaunt's had a bearing not only on his insurability in the amount and on the plan for which he made application but also on the prayer for reformation, which lies in Equity. Its argument to that effect, however, is ignored by the opinion of the Circuit Court of Appeals.

Bases of the Alleged Contract

(with reformation assumed).

While the respondent recognized that she had no standing in court unless her prayer for reformation were first granted—a reformation which would put the petitioner in the fictitious situation of having received and considered an application differing from the one it in fact received and considered—, we shall now assume that this prayer was granted. She still had the burden, nevertheless, of establishing her allegation that application and receipt "constituted a contract of temporary insurance"

in effect at Gaunt's death. This burden, in the petitioner's view, was not even remotely discharged, the respondent failing in respect of both fact and law. Succinctly put, the essential facts on this issue, other than those already recited (*supra*, p. 2), are these:

The application contained certain conditions which were set forth directly over the applicant's signature. Those of the greatest present importance are "B" and "H", although "F" which reserved in the petitioner the right to require other evidence of insurability satisfactory to it continues to be pertinent also.

Condition "B", in plain and simple English, provided that *if* the petitioner were satisfied, in accordance with *its* rules, of the applicant's insurability "for the amount and on the plan applied for without modification", *and if* the application, *prior to his death*, were approved by it at its Home Office, then the insurance applied for should be in force as of the date of completion of Part B (physical examination, admittedly completed). These two conditions of "B", recognized by the respondent as such but with the claim that the second did not count, were set forth conjunctively and in the same sentence. They were separated by nothing more arresting than a comma.

Condition "H", also in plain and simple English, informed the applicant that if the petitioner did not approve the application within sixty days from the date of Part B, thereof, or if it did not give notice of action thereon, the application should be deemed to have been declined.

In the short temporary receipt which was given to the applicant for the premium advance, the content of Conditions "B" and "H" was repeated in virtually identical language; and these conditions, in fact, constitute the whole of the substantive text of that receipt. Clauses "B", "H" and "F", also the temporary receipt, are quoted in an appendix annexed to this petition and its supporting brief.

The Circuit Court of Appeals, by the necessary effect of its judgment, held *both* the approval-before-death and

the sixty-day clauses of application and receipt nugatory; indeed, it in effect rewrote both application and receipt by deleting these clauses (and Condition "F" also, for that matter) but permitting the clause relative to insurability to remain. In this way, and contrary to overwhelming weight of authority, local authority included, it *imposed* a contract upon the petitioner which the petitioner in express language had said it would not write.

As to Insurability.

Was the other part of Condition "B", *i. e.*, that relating to insurability, met? Did the plaintiff prove, as was her admitted burden, that, except for the applicant's death, a policy "for the amount and on the plan applied for without modification" would have been issued to him? The Trial Court answered in the affirmative. This conclusion was challenged by the petitioner, in an argument ignored by the opinion of the Circuit Court of Appeals, as unwarranted by the subsidiary or basic findings of fact which, indeed, unanswerably compelled an opposite conclusion, *i. e.*, that the respondent's burden had *not* been met. It was always the petitioner's position that the applicant was not insurable under its rules in the amount and on the plan applied for without modification. And it must be remembered that any modification at all—in amount, plan, premium rate or otherwise—would at law have amounted to a rejection of the application, as counsel for the respondent have acknowledged.

Recital of all facts and factors relating to insurability need not be undertaken here since the affirmative and unchallenged findings of subsidiary fact concerning the need for reinsurance under the petitioner's rules, together with what otherwise appears about the applicant's conduct subsequent to date of application (*supra* and *infra*, pp. 4, 21-22), are determinative.

One of the petitioner's rules was that, in the type of risk presented by this application, it would not itself

assume a burden of more than $10,000, principal amount. Since the application was for $15,000, principal amount (plus double indemnity, so-called, for certain types of accidental death), it would have transmitted it, with pertinent data, to its reinsurer, Lincoln National Life Insurance Company of Indianapolis, Indiana, for approval or disapproval as to the surplusage of $5,000, *assuming* it had first decided that, for its own part, it was willing to insure the risk in the amount of its stated ceiling of $10,000. [Such transmittal it would have made, as the unchallenged finding shows, despite its power to bind Lincoln summarily.]

As heretofore said, the petitioner ceased underwriting activities on the application when it learned that, on the night of August 24-25, 1943, Gaunt had been killed while illegally aboard a freight train in South Dakota. Thus, whatever might have been its own decision concerning the application had Gaunt lived, it regarded the matter as thenceforward academic and, of course, did not transmit it to Lincoln.

Lincoln, then, never saw the application. It was never asked by anyone, *not even by the respondent—at least not in court or by deposition—*, to say what it would have done, or thinks it would have done, had the application been laid before it for decision.

The respondent consequently failed to discharge her burden of proof on this subject which was to show that, but for the applicant's death, the policy in the amount and on the plan applied for, without modification, would have been issued; and the judicial conclusion that such a policy would have been issued, it is manifest, rests on a vacuum—if for no other reason than that the necessary reinsurance link, an integral part of the petitioner's rules, is missing. In this connection, one should bear in mind that, as counsel for the respondent concede, the application would have stood rejected had Lincoln done anything less than wholly to approve the application,

had it been asked to act, *in the amount and on the plan applied for, without modification.*

Jurisdiction.

Jurisdiction of the District Court, as appears *supra* at page one, was based solely on diversity of citizenship. [Judicial Code, section 24(1), as amended: 28 U. S. C. A., §41(1), as amended.]

From a judgment in the District Court for the petitioner, the respondent appealed to the Circuit Court of Appeals for the Second Circuit under Section 128, as amended, of the Judicial Code. [28 U. S. C. A., §225(a), First, and (d), as amended.]

This Court, by virtue of subparagraph (a) of Section 240, as amended, of the Judicial Code, has power and authority, acting upon this petition, to require certification to it, by certiorari, of the cause before the Circuit Court of Appeals, including its judgment, for purposes of full review and determination [U. S. C., Title 28, §347; 28 U. S. C. A., §347.]

The Questions Presented.

The questions presented by this petition for a writ of certiorari are these:

1. Whether or not the Circuit Court of Appeals erred in holding, specifically as to the issue of construction of the language of application and receipt and by necessary implication as to the other issues (*i. e.*, reformation, the requisites of contract, insurability), the basic facts concerning which appear *supra,* that there was an absence of applicable local law, *i. e.,* Connecticut law as ruled by the lower courts.

2. Whether or not, even were there an absence of controlling local decisions and statutes (which is emphatically

denied), the Circuit Court of Appeals could ignore or fail to find and follow the overwhelming weight of, even if not unanimous, authority in the petitioner's favor in other jurisdictions on the issues of construction and reformation, especially as Connecticut (see *infra*, p. 29) would follow that authority under previously established doctrine and practice.

3. Whether or not the Circuit Court of Appeals erred in rendering a decision which, widely departing from the accepted and usual course of judicial proceedings, fails not only to treat but even to mention certain record facts and claims of law upon which the petitioner reasonably placed reliance.

4. Whether or not the Circuit Court of Appeals erred in rendering a judgment which, of necessity, held *all* of these things, even where the opinion did not so declare, namely:

(a) That the application in the hands of the petitioner should be reformed so as to have the applicant's choice of effective date of any policy issued read as the date of completion of Part B thereof rather than date of issue, the way it was written, the petitioner to be retroactively bound to that reformation;

(b) That the application was not an offer, an offer which for want of acceptance, and acceptance before Gaunt's death, expired; but that some other contract arose, the anatomy of which (*e. g.*, the nature and content of the offer, the acceptance, the consideration or mutuality of obligation) goes unexplained, as does the question of how it responds to the allegations of the complaint;

(c) That the approval-before-death and the sixty-day clauses of application and receipt were null and void and, in effect therefore, should be totally deleted therefrom (and so, too, with Clause "F");

(d) That the applicant was insurable under the petitioner's rules for the amount and on the plan applied for without modification, and so continued from the standpoint of right to the date of his death, and that, but for his death, a policy for the amount and on the plan applied for, without modification, would have been issued to him.

Reasons for Allowance of Writ of Certiorari.

The discretionary power of this Court to issue a writ of certiorari is invoked upon the following grounds:

1. The Circuit Court of Appeals signally failed to follow applicable local decisions which directly pointed to and would, in the controlling local jurisdiction, *i. e.*, Connecticut, certainly have resulted in a judgment for the respondent. More than this, the court, taking the only issue concerning basic liability to which it expressly directed itself, namely, construction of the clauses of application and receipt dealing with insurability and time for approval, exhibited a complete disregard for the well nigh, if not actually, unanimous general authorities resolving this issue in the petitioner's favor. These favorable authorities, which include every known decision of other circuit courts of appeal, Connecticut would have followed, assuming absence of determinative cases of its own, such being its practice and its law.

The attitude with which the court approached the case seems to be revealed in the last sentence of the concurring opinion, an attitude which manifested anxiety lest the court might abdicate its "judicial role" for that "of 'ventriloquist's dummy' as to state law". We do not see how the court could have done more than it did do to flout both letter and spirit of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1938), *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202 (1938), *West, et al.* v. *American Telephone and Telegraph Co.*, 311 U. S. 223

(1940), *Klaxon Company* v. *Stentor Electric Manufacturing Company, Inc.*, 313 U. S. 487 (1941), *Guaranty Trust Company* v. *York*, 326 U. S. 99 (1945), and allied cases.

We shall cite in our brief, annexed in support of this petition, those authorities which we believe to be controlling as the law of the local jurisdiction involved in the thought that by so doing we can best acquaint this Court, from its own standpoint, with their nature.

2. The judgment of the Circuit Court of Appeals amounts to a judicial fiat *imposing* a contractual liability upon the petitioner because, without explanation or comment, it brushes aside certain facts established of record as well as basic principles of contract law. The court's action, then, was something more than, as well as, a refusal or failure to adhere to the law enunciated by this Court in *Erie Railroad Company* v. *Tompkins* and its associated cases. It was, by its summary character, by its by-passing of sound defenses which could not legally or equitably be by-passed, so gross a departure from the accepted and usual course of judicial proceedings, and also a sanction of such a departure in respect to the District Court's conclusion of insurability, as to call for an exercise of this Court's power of supervision.

No one who read the record and briefs, including the petition for rehearing, before the Circuit Court of Appeals could, in our belief, say that the petitioner had had its day in court there.

As with the citation of controlling authorities mentioned under Ground 1 above, we shall defer particularization of this ground to our supporting brief, *infra*.

3. The case is an important one of general interest.

To right an injustice in any case; to set aright a court which has indulged in arbitrary rather than judicial practice; to compel obedience to the law of *Erie Railroad Company* v. *Tompkins*, and its allied cases, and to say

whether or not such means that, even were one to assume a want of decisive local decisions and statutes, weight of authority must be respected; to enunciate a uniform rule where, as here, the court, assuming itself to be free from the binding influence of other authorities, made a decision in conflict with every known decision of other circuit courts of appeal on the same subject:—these are matters of great and general importance which are brought forward by the judgment of the Circuit Court of Appeals in the case at bar.

Apart from such matters as these, however, we would call the Court's attention to the fact that this case deeply affects, in a nation-wide sense, the field of life insurance and other fields of insurance, such as health and accident, related to it. This is so, in particular, as to the issue of construction because the Circuit Court of Appeals' handling of that issue (with Judge Clark dissenting) is novel. It is, indeed, a handling which rewrites the petitioner's application and receipt forms; which, contrary to *all* respectable authority, forces a company into the acceptance of a contract it expressly said it would not accept or write; and, more than all this, which leaves the petitioner and every life insurance company (in fact, every insurance company) quite at sea as to what to expect next, as to what sort of buoy in the English language will provide a reliable channel marker.

We think it would be safe to hazard a guess that no life insurance decision in many years, particularly when one considers the prestige of the tribunal involved, has aroused an equal amount or attention among life insurance companies and persons interested in life insurance. And life insurance companies, of course, are not mere commercial enterprises. Existing policyholders, big and little, of whom there are many millions in this country, have a vital interest, whether or not they recognize it, in decisions like the one at bar. Perhaps we should add that with a mutual company like the petitioner, its policyholders *are* the company.

Conclusion.

From the foregoing we believe it to be evident that the Circuit Court of Appeals' judgment is one that should be reviewed by this Honorable Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and of all proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Court as provided by law; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to it may seem proper.

Respectfully submitted,

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

By Wallace W. Brown,
Attorney for Petitioner.

Hartford, Connecticut, May 16, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .

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—against—

RHODA S. GAUNT, individually and as administratrix of the Estate of James A. Gaunt, Jr., deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Opinions of the Courts Below.

The District Court's opinions, for there were in reality two dealing with the merits even though the second was technically directed to motions to amend findings of fact and conclusions of law, do not appear in the Federal Supplement. However, the first one, dated April 17, 1946, appears in 11 Life Cases (C. C. H.) 771, while the second one, dated July 23, 1946, appears in 11 Life Cases 980. These opinions also appear in Part I of the original record, *i. e.*, as certified by the Clerk of the Circuit Court of Appeals, at pages 58 and 75 respectively of "Appendix to Brief of Appellant".

At the date of this writing, the opinion of the Circuit Court of Appeals in the case, rendered March 31, 1947, is not to be found in the Federal Reporter. It does, however, appear in 12 Life Cases (C. C. H.), at page 423; also in Part III of the certified record, above mentioned. [The denial of the petition for rehearing on April 15, 1947, was without opinion.]

Grounds for Writ of Certiorari.

The petitioner's reasons or grounds for seeking a writ of certiorari are stated in the petition to which this brief is annexed, *supra*, pages 10-12. They also succinctly appear in our "Summary of Argument", *infra*, pages 17-18. To those citations reference is now respectfully made.

Statutory Provisions.

The jurisdictional statutes, which need no recitation, are cited under "Jurisdiction" in the petition (*supra*, p. 8). In the courts below, the petitioner cited as pertinent to its position about local insurance Section 4182 of the General Statutes of Connecticut (Revision of 1930), the text of which will be set forth under Point II of our argument, *infra*, page 28.

Statement of the Case.

The facts material to consideration of the petition for a writ of certiorari, except as supplemented somewhat in conjunction with the argument hereinafter presented, are set forth in pages 2-8 of that petition, to which reference is respectfully made; and so they need no repetition here.

Errors to Be Urged.

It is urged that the Circuit Court of Appeals erred in holding adversely to the petitioner on the issues, and each of them, set forth under "The Questions Presented" in the petition (*supra*, pp. 8-10), to which reference is respectfully made.

Summary of Argument.

The petitioner's argument in support of its petition may be summarized, as follows:

I. The refusal of the District Court to grant the respondent's prayer for reformation of the application should have been upheld by the Circuit Court of Appeals because application of controlling local decisions to the unchallenged facts of record (*supra*, pp. 3-4) required such a holding.

The Circuit Court of Appeals not only went counter to these decisions but, in so doing, clearly departed from the accepted and usual course of judicial proceedings. This is so because, except for a possible inference from the circumstance that the court directed a monetary judgment for the respondent, one cannot say that it even consciously passed upon the issue of reformation. It assuredly did not treat that issue, *i. e.*, express an opinion on the facts and law laid before it. And this failure occurred despite the fact that the issue was always recognized by the respondent's counsel as one preliminary to any other issue and that it constituted the first two of the respondent's five points of appeal (two of the remaining three having involved an unsuccessful attempt to secure double indemnity).

II. The Circuit Court of Appeals acted arbitrarily and contrary to the local law it was bound to honor, under

Erie Railroad Company v. *Tompkins* and allied cases (cited *supra*, pp. 10-11), in holding expressly or by necessary implication from the judgment it entered that: 1., The bases of a contract of life insurance were present; 2., the approval-before-death and sixty-day clauses of application and temporary receipt were null and void; and 3., the applicant, had he lived, would have received a policy in the amount and on the plan for which he applied, without modification. *All* of these holdings, in addition to reformation of the application as prayed, were of course necessary to rendition of a judgment for the respondent.

Argument.

I.

The controlling local law, ignored by the Circuit Court of Appeals, plainly required denial of the prayer for reformation of the application.

The District Court did not grant the respondent's prayer for reformation. The Circuit Court of Appeals, if it can be said to have ruled on the issue, did so only by its judgment which reversed the former court's judgment for the petitioner and directed one for the respondent.

While in the first paragraph of the majority opinion the facts incident to execution of the application and the checking of desired effective date are briefly recounted (although the fact of Kelman's telling Gaunt and the respondent that this application would proceed to the petitioner's home office for acceptance or rejection goes unmentioned), there is nothing else to indicate that the issue of reformation, an acknowledged prerequisite to all of the other issues, received any thought whatever; and certainly everything the petitioner said on the point in its brief, including citation of closely relevant decisions,

is disregarded. This kind of offense, which is repeated by the court in other respects, even as to the one issue (aside from that of double indemnity, not now pertinent) it did treat, is surely arbitrary practice in the extreme and hence a wide departure from the accepted and usual course of judicial proceedings.

Five decisions, two by the Connecticut Supreme Court of Errors, two by the Supreme Judicial Court of Massachusetts, and one by the Circuit Court of Appeals for the Second Circuit were submitted by the petitioner to the court below to show that, quite apart from the applicant's inequitable conduct occurring subsequent to date of application (see *supra* and *infra*, pp. 4, 7, 21-22), the application should not be reformed since an applicant must stand responsible for the content of his application. Those cases were:

Kelly v. *John Hancock Mutual Life Insurance Company*, 131 Conn. 106, 110, 38 Atl. (2) 176 (1944);
Russo v. *Metropolitan Life Insurance Company*, 125 Conn. 132, 137, 3 Atl. (2) 844 (1939);
Bogosian v. *New York Life Insurance Company*, 315 Mass. 375, 380-382, 53 N. E. (2) 217 (1944);
Cauman v. *American Credit Indemnity Company*, 229 Mass. 278, 284, 118 N. E. 259 (1918);
Metropolitan Life Insurance Company v. *Cohen*, 96 F. (2) 66 (C. C. A., 2, 1938).
[See also *Schiller* v. *Metropolitan Life Insurance Company*, 295 Mass. 169, 175, 3 N. E. (2) 384, 387 (1936)].

Connecticut was ruled by the District Court, with the concurrence of the Circuit Court of Appeals, to be the state whose law would control; and, of course, as to any question of conflict of laws between Connecticut and Massachusetts, the Connecticut rule would govern under *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941) and *Griffin, Administrator* v. *McCoach, Trustee*, 313 U. S. 498 (1941).

The question of whether Connecticut law exclusively, or Massachusetts law (whether fully or partially) under Connecticut's conflict of laws doctrine, ought to be applied in the case seemed to be of relatively little importance to us since, as is well known, these two New England states, lying adjacent to one another, tend to see eye to eye in legal matters. Both, too, contain cities—Hartford and Boston—which are national insurance centers. Certainly in the eyes of the Supreme Court of Errors of Connecticut no state court receives more, if as much, respect as does the Supreme Judicial Court of Massachusetts; and it would be arbitrary and contrary to all reasonable expectation to say that, assuming a want of a determinative case of its own on a point, Connecticut would not follow a relevant Massachusetts decision on that point. And, indeed, the same general observation would apply, perhaps with equal force, to Connecticut and New York (another insurance state), as Judge L. Hand appeared to recognize in colloquy between counsel during oral argument.

The cases cited above, in absence of other and more closely relevant cases which have yet to be produced, manifestly compel one conclusion on the issue of reformation, namely: that the prayer for reformation should be, as it was by the District Court, denied. On what theory is this controlling local law disregarded? We have no means of knowing. We cannot even know whether or not the Circuit Court of Appeals was conscious of the existence of the issue and the applicable law when it voted. The opinion simply greets one with *silence* on the subject.

The very recent *Bogosian* case (*supra*, p. 19), for instance, is one of those rare cases in the law which is almost precisely on all fours with the case at bar in so far as the issue of reformation goes. To it, indeed, the case at bar is plainly *a fortiori*. In that case an applica-

tion for reinstatement of life insurance rather than an application for an initial policy was involved. But the court held that the plaintiff applicant was bound by recorded answers to the questions put by the application form *despite the fact that, after his signature was affixed thereto, those answers were falsely written in by a reinstatement clerk who, in addition, falsely represented to the plaintiff that the instrument involved was not an application but a receipt.*

In the *Kelly* case (*supra*, p. 19), brought by the beneficiary of a life insurance policy after the assured's death, it was conceded that certain representations made in the application were untrue. But the plaintiff successfully claimed to a jury that these representations were not in fact made by the assured; that the soliciting agent filled in the answers; that he did not read the completed application to the assured, who signed in ignorance of its contents. (There was no issue of fraud or misrepresentation upon the part of the solicitor.) Reversing the lower court, the Supreme Court of Errors held that failure of the assured to know the contents of the application constituted "inexcusable negligence"; that she was under a duty to know its contents (131 Conn. 109-110).

How could the Circuit Court of Appeals, in the light of these cases, conceivably have said, if it did say anything by silence, that there was no applicable local law on this issue of reformation; that there was not even, so one might gather, any "available data" on the subject within the meaning of West, et al. v. American Telephone and Telegraph Company, 311 U. S. 223, 237 (1940)?

He Who Seeks Equity Must Himself Do Equity.

When he signed the application in August of 1943 Gaunt was an intelligent young bachelor (nearly 22 years old) of good moral reputation in his community. Classi-

fied "IV-F" by Selective Service in July of 1942 for defective vision of a relatively minor character, which required him to wear glasses, he was otherwise in sound health. So far as appears, he made no effort to enter the service but he did interrupt his college education to become a semi-skilled machine operator in a Waterbury war factory where, on August 3, 1943, the date of the application, he was still employed.

On August 15, 1943, Gaunt left this employment to carry out a decision previously taken, the exact time of which is unknown, to leave Waterbury and seek employment on the Pacific Coast or in Alaska. On August 17, 1943, a Waterbury physician, acting for the petitioner, gave him a second physical examination which it thought to be necessary. On August 19, 1943, Gaunt did leave Waterbury for the West; and in South Dakota, on the night of August 24-25, 1943, while "riding the rails" in violation of law, he was shot and killed by a companion whom he had picked up en route.

None of Gaunt's intentions and actions above described, and which he certainly knew would render him totally uninsurable, were divulged by him to the petitioner. This was distinctly *not* doing equity; and the plea for reformation, of course, sounds in equity. Moreover, as will appear in our discussion of insurability, an applicant is under a legal compulsion to divulge such things as these.

The maxim of "he who seeks equity must himself do equity" is, of course, so thoroughly establised in the law of every jurisdiction as hardly to need citation of authority, although perhaps it would not be amiss to mention here the recent case of *Savings Bank of New London* v. *Santaniello,* 130 Conn. 206, 210-211, 33 Atl. (2) 126 (1943), where the validity of the maxim was again recognized. The companion "clean hands" maxim seems applicable here, too; and its vitality will be attested by the comparatively recent case of *Boretz* v. *Segar,* 124 Conn. 320, 323-324, 199 Atl. 548 (1938).

II.

The petitioner entered into no contract of life insurance with Gaunt; and the Circuit Court of Appeals, in holding that it did, did so arbitrarily and in disregard of fact and applicable local law.

Judgment for the respondent was legally impossible except as the Circuit Court of Appeals, acting as if it were an arm of Connecticut's Supreme Court of Errors, could resolve not only the issue of reformation (constituting her first two points of appeal) and, *also, each* of the three issues relating to formation of contract, discussed below under subheadings 1, 2 and 3, for her. To Issue 2 alone, however, does the court's opinion direct itself—and then only as to Condition "B" of application and receipt, quite omitting mention of Conditions "H" and "F" (*supra*, p. 5). As with the issue of reformation, discussed under Topic I above, the court cannot be said to have resolved Issues 1 and 3 at all except in some sense of default implicit in the judgment it entered for the respondent since they get no legal treatment in the opinion despite the fact that, with citation to record and authorities, they were fully argued.

1. The Bases of Contract, Except for an Offer by Gaunt, Were Totally Absent.

The majority of the Circuit Court of Appeals (for Judge Clark, despite his "concurring" opinion, in effect dissented) could never have arrived where it did had it abandoned generality for a concrete delineation of the contractual liability it imposed upon the petitioner. One will notice in reading the opinion a singular absence of the spelling out process which, had it been undertaken, must have led to a judgment for the petitioner under the law of Connecticut or that of any other jurisdiction. This law is so elementary, well-established and sound as to need no citation except perhaps, to some extent, as it has

been applied in the life insurance field. [Perhaps it should be remarked in passing that, under Connecticut law as shown by the *Best* case (*infra*, p. 25) and *Supreme Colony* v. *Towne*, 87 Conn. 644, 647, 89 Atl. 264 (1914), a contract arises in the state wherein occurs the last act necessary to render it complete and effective.]

Where, then, are the bases, the universally acknowledged requisites, of contract?

The offer, we know, was Gaunt's application, a fact unchanged by the circumstance that it was on a form prepared by the petitioner and was accompanied by a premium advance.

> *Swentusky* v. *Prudential Insurance Company*, 116 Conn. 526, 534-536, 165 Atl. 686 (1933);
>
> *Rogers* v. *Charter Oak Life Insurance Company*, 41 Conn. 97 (1874), [cited approvingly in *Piscitello* v. *Boscarello*, 113 Conn. 128, 130, 154 Atl. 168 (1931)];
>
> *Allen* v. *Massachusetts Mutual Accident Association*, 167 Mass. 18, 44 N. E. 1053 (1896) [opinion by Holmes, *J.*];
>
> *Marks* v. *Hope Mutual Life Insurance Company*, 117 Mass. 528 (1875);
>
> *Metropolitan Life Insurance Company* v. *Cohen*, 96 Fed. (2) 66 (C. C. A. 2, 1938).

Cases like the above holding to the same effect either directly or by necessary implication are legion. These listed cases and numerous others were cited to the Circuit Court of Appeals; but, as is evident, they went unheeded. Those cited, including one from the Circuit Court of Appeals itself as will have been noticed, plainly suffice as to the applicable local law.

In the *Swentusky* case, the Connecticut Supreme Court of Errors (by Maltbie, *C. J.*) held that, at most, an advance of premium money by the applicant *might* put the insurance company under an implied contractual duty to act upon the application within a reasonable time, it

making no difference that otherwise he received *no* benefits from such advance (116 Conn. 531); although in the case at bar, of course, distinct benefits, though contingent on approval, would have resulted from premium advance had completion of Part B been the designated effective date.

The *Swentusky* case is also notable for this statement:

> "We must dismiss as lacking legal foundation the contention that insurance companies are so charged with a public interest as to impose upon them a peculiar duty to protect the interests of those who apply to them for insurance. An insurance company does indeed, as does every corporation, enjoy a franchise from the State, and it is subject to unusual oversight by the State in the conduct of its business. But to hold that, because of these facts alone, there are imposed upon it duties or liabilities having no sanction in the established principles of law or in the statutes governing the insurance business, would be to open a field of legal liability the limits of which we cannot encompass, and which would go far to introduce chaos in the entire business of insurance, indeed, would almost necessarily reach out into the field of other specially chartered corporations occupying not dissimilar relations to the public, as banks, utility companies, and the like. Public interest more requires that stability of the insurance business which is necessary to guard the great body of persons who enter into relations with it for their own protection and that of those dependent upon them, than it does that certain individuals should be saved the loss which may result by adherence to established legal principles."

Another Connecticut case illustrative of that state's law on the subject of offer, in conjunction with the payment of a sum of money by the offeror, is *Alfred M. Best Co.,*

Inc. v. *Goldstein,* 124 Conn. 597, 1 Atl. (2) 140 (1938). In that case the plaintiff corporation, a nonresident, solicited contracts in Connecticut through a travelling salesman. Although both the defendant and the company's representative signed company forms of contract in Connecticut, the latter marking it "Approved" and leaving a duplicate thereof with the former, the originals were forwarded to the home office in New York for acceptance. In the contract form, the company reserved the right "to reject any contract upon refund of the amount paid therefor, or to discontinue the same . . ." New York was held to be the place of contracting. *Inter alia,* the Court said:

> "The signing of the agreement (by both prospect and agent) was no more than an offer which ripened into a contract only when approved by the company. *Had the defendant paid the agreed price, this would have been merely an incident to the offer.*" (p. 602; parenthetical clause and italics ours.)

It should perhaps be observed that an offer remains an *offer* until accepted, no matter how inartistic, confusing, ambiguous, repugnant or unconscionable may be its terms and that this truth is in no way altered by the fact that the terms thereof are set forth by the offeree on one of its forms. And conditional offers in Connecticut, as illustrated by this *Best* case, and by the *Swentusky* and *Francis* cases (see *infra,* pp. 30, 31), are valid.

Turning, then, to the other essential elements of contract, where were they in the case at bar?

The offer (*i. e.,* the application) was directed to the petitioner at its home office in Boston and, if accepted, was to become a part of the policy contract. No such acceptance occurred. Instead the offeror died. At common law in all jurisdictions an offer expires with the offeror. In this case, the offeror Gaunt, by the terms of the application, was specifically warned that, assuming

he died before the approval (if any) of the petitioner, the offer would expire.

Where is the requisite meeting of minds? There was no acceptance of the application by the petitioner; and, moreover, the petitioner had before it an application substantially differing (on account of choice of effective date) from the one which the applicant intended. [If, as we have submitted (*supra*, pp. 18-22), he was bound by what was written, the respondent is out of court on her counsel's own admission.]

Where is there mutuality of obligation? If the petitioner was in some way bound, surely it was necessary for the applicant also to be bound. But, as the unchallenged finding shows, he was at liberty at any time, prior to acceptance of his application, to withdraw it and receive back the premium money he had advanced.

What were the terms, exactly, of the "contract of temporary insurance" allegedly made in Connecticut? [Of course, under the court's ruling, it was not a contract of temporary but of permanent insurance which arose if the petitioner was liable because, whether Gaunt lived or died, it was held bound to accept the application.] We have never received a real answer to that question; but this seems an appropriate point to observe that, under Connecticut statutory law (duly cited to, but passed over without comment by, the Circuit Court of Appeals), such a contract could not have arisen. Before quoting this statute, we would ask this Court to remember that the forms of application and temporary receipt in issue, and also the form of policy which would have been issued had the application been approved, were at all times on file with Connecticut's Insurance Commissioner; that the application, had it been accepted, would have become *a part* of the contract of insurance and that the soliciting agent was severely limited to solicitation only, both by the terms of his employment, as clearly set forth in the application, and by the restrictions imposed upon

him by the statutes of Connecticut. Our reference then is to Section 4182 of the General Statutes of Connecticut (Revision of 1930), the text of which reads as follows:

> "No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; *nor shall any such company or any agent, subagent, broker or other person make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon.*" (Italics supplied.)

2. The Circuit Court of Appeals, in Construing the Language of Application and Receipt, Misapprehended and Failed to Follow the Controlling Authorities.

Four judges have passed upon the construction of the language of Condition "B" of the application, as repeated virtually verbatim in the temporary receipt. The result is a two to two division. His Honor, Judge J. Joseph Smith, more learned in the controlling law of Connecticut than any of the other three judges, held that an ordinarily intelligent layman (and Gaunt was all of that), "having read the two 'if' clauses" contained in both application and receipt, could not have expected himself to be protected against the hazard of death if he died before date of approval of that application and that, in any event, the approval-before-death clause was valid. Judge Clark, whose acquaintance with Connecticut law is also wide, agreed with Judge Smith. Judges Learned Hand and Augustus N. Hand, whose conclusions became the judgment of the Circuit Court of Appeals, held otherwise and

did so under a very great misapprehension as to the state of the controlling authorities, or which, anyway, they shouldered aside.

With all due deference, we believe that the opinion of the majority fails to disclose any truly serious attempt upon its part to sit as if it were an arm of Supreme Court of Errors of the State of Connecticut with a view to ascertaining and applying Connecticut judicial and statutory law within the requirements of such cases as *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64 (1938); *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202 (1938); *West* v. *A. T. & T. Co.,* 311 U. S. 223 (1940), which imposed a duty of making ascertainment of the applicable state law "from all the available data" (p. 237), and *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109 (1945).

The majority even disregarded what we submit is the unanimous weight of general authority although, as is well known, any appellate court will, in absence of some very compelling reason to the contrary, follow the weight of authority. This is particularly true where that weight is represented by courts of distinction, as in the instant case. We cannot escape a feeling that the majority of the Circuit Court of Appeals chose to consider this case, on the sole issue of construction it singled out for attention, as virtually one of first impression and to decide as it thought ought to be the law.

Following the weight of authority, in absence of compelling reason for not doing so, is not only practiced by the Connecticut Supreme Court of Errors, as by other appellate courts, but such is Connecticut law, as illustrated by clear implication at least, in the very recent case of *Wehrhane* v. *Peyton,* 133 Conn. 478, 500-501, Atl. (1947). *O'Connor* v. *Metropolitan Life Insurance Company,* 121 Conn. 599, 607-609, 186 Atl. 564 (1936), is an insurance case showing Connecticut's practice in this regard.

It was wholly unreasonable, negligent and arbitrary for the Circuit Court of Appeals to hold in the light of the authorities we shall cite below that the approval-before-death and the sixty-day clauses of application and receipt (*supra*, p. 5) would have been, or would likely have been, ruled as null and void by the Connecticut Supreme Court of Errors. There is every reason to believe the opposite; and the burden of proof, after all, was on the respondent. [The sixty-day clauses go unmentioned in the Court's opinion; but, by the necessary force of its judgment, they also are ruled invalid.] The authorities we speak of are these:

Conn. G. S. (1930), §4182 (quoted *supra*, p. 28);

Swentusky v. *Prudential Insurance Company of America, supra*, 116 Conn. 526, 165 Atl. 686 (1933);

Kelly v. *John Hancock Mutual Life Insurance Company, supra*, 131 Conn. 106, 38 Atl. (2) 176 (1944);

Russo v. *Metropolitan Life Insurance Company*, 125 Conn. 132, 3 Atl. (2) 844 (1939);

Braman, et ux. v. *Mutual Life Insurance Company of New York*, 73 Fed. (2) 391 (C. C. A. 8, 1934);

Winslow v. *Mutual Life Insurance Company of New York*, 93 Fed. (2) 802 (C. C. A. 9, 1938);

McCampbell v. *New York Life Insurance Company*, 288 Fed. 465 (C. C. A. 5, 1923);

Ivie v. *International Life Insurance Company*, 217 Ala. 559, 117 So. 176 (1928);

Whitney v. *Union Central Life Insurance Company*, 47 Fed. (2) 861, 864-6 (C. C. A. 8, 1931);

Shira v. *New York Life Insurance Company*, 90 Fed. (2) 953 (C. C. A. 10, 1937);

Arcuri v. *Prudential Insurance Company of America*, 290 N. Y. S. 567, 248 App. Div. 501 (1936) [cited with approval in *Metropolitan Life Insur-*

ance Company v. *Cohen*, 96 Fed. (2) 66, 68 (C. C. A. 2, 1938)];

Corning v. *Prudential Insurance Company of America*, 288 N. Y. S. 661, 248 App. Div. 187 (1936); affirmed 273 N. Y. 668, 8 N. E. (2) 338 (1937);

Hughes v. *John Hancock Mutual Life Insurance Company*, 297 N. Y. S. 116, 163 Misc. 31 (Municipal Court, 1937); judgment, as modified by the Appellate Term, affirmed, without opinion, 3 N. Y. S. (2) 899, 254 App. Div. 570 (1938);

Goldstein v. *New York Life Insurance Company*, 162 N. Y. S. 1088, 176 App. Div. 813 (1917); affirmed 227 N. Y. 575, 124 N. E. 898 (1919);

Martin v. *Equitable Life Assurance Society*, 58 N. Y. S. (2) 845 (Supreme Court, Special Term, 1945).

See also:

John Hancock Mutual Life Insurance Company v. *McClure*, 218 Fed. 597 (C. C. A. 3, 1914); and

Giddings v. *Insurance Company*, 102 U. S. 108 (1880), which was cited approvingly in *Francis* v. *Deming*, 59 Conn. 108, 112, 21 Atl. 1006 (1890).

The Connecticut decisions cited in this formidable listing are put there because they, particularly the *Swentusky* case which involved an approval condition, taken along with other Connecticut decisions cited in this brief, point clearly to the result which its Supreme Court of Errors would have reached, *i. e.*, sanction of the approval-before-death and sixty-day clauses, had the facts of the case at bar been before it. [That would seem to be the reason why the respondent, a citizen of Connecticut, brought her action in a Federal court.] The other cases are squarely in point on the exact point at issue, namely: whether or not, given an application providing for an

effective date of insurance which antedates the date of approval, should the applicant prove to be insurable, and given also an advance of premium with such application, an approval-before-death condition or an equivalent thereof is valid? These cases, stressed to the Circuit Court of Appeals as ones declarative of sound and well-established law, those under "see also" excepted, go unmentioned in its opinion, except for some from New York. Aware, however, that there were "unquestionably decisions which excuse the insurer", it cites but three, one from Washington (by way of a *dictum*), one from Arkansas and one from Utah [12 Life Cases (C. C. H.) 425], as follows:

**Starr* v. *Mutual Life Insurance Company*, 41 Wash. 228, 83 Pac. 116 (1905);

Cooksey v. *Mutual Life Insurance Company*, 73 Ark. 117, 83 S. W. 317 (1904);

Field v. *Missouri State Life Ins. Co.*, 77 Utah 45, 290 Pac. 979 (1930).

*[Though not cited by the court, see also, on the general Washington attitude, *Basinsky* v. *National Casualty Company*, 122 Wash. 1, 209 Pac. 1077 (1922)].

Why just *these* cases? Why no mention of the more weighty and, generally speaking, much more recent cases cited to the court by the petitioner? The net effect is to create a highly misleading impression about the state of the authorities favorable to the petitioner. In this connection, the court undertakes to cite two other decisions favorable to the petitioner's viewpoint, one from this Court and one from the Supreme Court of Kentucky, but which, quite unconvincingly we think, it seeks to explain away [12 Life Cases 425], namely:

Insurance Company v. *Young's Administrator*, 23 Wall. 85 (1874);

Northwestern Mutual Life Insurance Company v. *Neafus*, 145 Ky. 563, 140 S. W. 1026 (1911).

The majority of the court then went on to say: "The law of New York is in doubt." However, as Judge Clark recognized in his "concurring" opinion, such is simply not the case,—not, anyway, unless one can say that several cases exactly in point, and decided for the insurance companies involved, two of them affirmed by the Court of Appeals (one of which was the comparatively recent, and leading, *Corning* case, *supra*, p. 31), leave New York law in doubt because that law has not been expressed by a formal opinion of its Court of Appeals! By what line of reasoning the majority could then go on wholly to dismiss the holdings in those decisions and emerge with a judgment *for* the respondent (who had the burden of proof), we can hardly conjecture, except to say that, having decided it would like to rule for the respondent, whose misfortune undoubtedly excited its sympathy (as it would the sympathy of anyone), it proceeded to do so by a *tour de force*.

Hart v. *Travelers Insurance Company*, 258 N. Y. S. 711, 236 App. Div. 309, affirmed 261 N. Y. 563, 185 N. E. 739 (1932), and *Buono* v. *Prudential Insurance Company of America*, 267 N. Y. S. 972, 240 App. Div. 898 (1933), based entirely on the authority of the former, are indeed two cases which, *standing alone*, would point against (though in no decisive sense) the petitioner's position. But the subsequently decided *Arcuri*, *Corning*, *Hughes* and *Martin* decisions (*supra*, pp. 30-31) narrow the *Hart* and *Buono* decisions to the point, we believe, of actual repudiation; but, repudiated or not, they narrow them so that they distinctly and expressly fall outside the issue at hand, which issue is resolved for the insurance company in each instance.

The majority opinion undertook to cite some cases outside of New York which, it said, were cases upholding the respondent's position [12 Life Cases 426]. Their defect is that they are not in point; for a court cannot be said to have decided that an approval-before-death condi-

tion, or its equivalent, in an application designed to confer the benefits of predating, would be invalid when no such condition in fact was embodied in application and receipt.

Stonsz v. *Equitable Life Insurance Co.*, 324 Pa. 97, 187 Atl. 403 (1936), seems nearest but it does not strike the mark of true equivalence or relevance as study quickly reveals; and, *inter alia*, there was no condition specifying approval before death (or some other time).

In *Duncan* v. *John Hancock Mutual Life Insurance Company*, 137 Ohio St. 441, 31 N. E. (2) 88 (1940), stressed by the lower court and the respondent, the application *specifically* provided for insurance coverage should the applicant die prior to date of issue of policy (a fact much stressed by the Ohioan court). Significantly enough, in *Leube* v. *Prudential Ins. Co. of America*, Ohio St. , 72 N. E. (2) 76, 78-9 (February 28, 1947), which admittedly is not an "all fours" decision on the exact issue now at hand, the Supreme Court of Ohio cited and approvingly discussed New York's *Corning* case (*supra*, p. 31).

In view of the foregoing, we believe it is probably correct to say that, *given facts substantially similar or fairly analogous to those at bar, the authorities have unanimously held for the insurance company.*

Division in the Court; the Majority's Doubts.

The "concurring" opinion of Judge Clark, as has already been observed, was an out-and-out dissent to the majority's opinion on the issue of validity of the approval-before-death clauses now under discussion [12 Life Cases 426-7]. More than this, it clearly should have been a dissenting not a concurring opinion because the concurrence was based on a ground which could not conceivably be accorded legal recognition, *i. e.*, "that the course of nego-

tiations required and controlled by the insurance company was 'unpardonable' ". In the first place, Judge Clark does not, nor could he, point to any unpardonable conduct upon the petitioner's part since the Findings show none; and, in the second place, "unpardonable conduct" as such has no recognition in law as a basis upon which to predicate liability.

It seems more than possible that by "unpardonable" conduct, Judge Clark was thinking that the petitioner had unpardonably (*i. e.*, unreasonably) delayed reaching a decision on the application before it,—an idea which appears to have influenced the thinking of the majority. If so, what all three judges overlooked is the fact that an issue of unreasonable delay *was* before the District Court and that that court resolved it in the petitioner's favor, a ruling which was not questioned in the respondent's appeal.

While the two judges best acquainted with Connecticut law (Judge Clark and District Judge Smith) unhesitatingly decided that the approval-before-death clause of application and receipt would be held valid and binding by Connecticut courts, it is important to notice that Judges Learned Hand and Augustus N. Hand, in addition to being vague about the anatomy of the alleged insurance contract and under a misapprehension about the state of the authorities, gave every evidence of believing themselves to be on soft ground.

Nowhere do these judges, by their majority opinion, say that the language of the disputed clause is ambiguous, or unclear in phraseology. The opinion admits that it "does indeed some violence to the words not to make actual 'approval' always a condition" *i. e.*, approval before death, but claims that "it does greater violence to make the insurance 'in force' only from the date of 'approval' " [12 Life Cases 424]. [If issued, of course, the policy is in force not on the date of approval but *as of* an earlier date. In other words, it is predated, carrying the admitted benefits thereof. Predating, as the authorities already cited show, is a common practice. But to predate a policy is *not* auto-

matically to say that it stands for all purposes precisely as if it had been *issued* on the predate.]

Then again, overlooking the clear mandate for the petitioner implicit in its words, the majority says this:

> "It is true that if the clause as a whole be read literally, the insured was not covered if he died after 'completion of Part B', but before 'approval'" [12 Life Cases 424].

Still again, the majority, plainly unsure of itself despite its misapprehension about the state of the authorities, says this:

> "Thus upon a preponderance of the decided cases the answer is in doubt, and we cannot be sure how a Connecticut court would decide for the point has never come up in that state. Unaided as we are (!), we rest our decision upon the reasons which we have tried to set forth" [12 Life Cases 426; exclamation point ours].

The truth appears to be, or so we feel as we read the opinion, that the majority found the laws of Connecticut, including what would be the views of her judiciary in the instant case, like unto so many annoying flies from the provinces which should be despatched with a minimum of effort. Perhaps the best evidence for the validity of this feeling will be supplied to one who, in connection with reading the court's opinion, asks himself this question: could one conceive *that* opinion, or anything substantially like it, being handed down by the Supreme Court of Errors of Connecticut?

Rules of Construction.

The Circuit Court of Appeals failed to follow those basic rules of construction which apply in Connecticut, with unusual strictness as was pointed out, and, in fact, in most if not all jurisdictions. Connecticut, indeed, goes

so far as to say that the "construction and legal effect of a contract 'cannot be changed or varied by reason of its inconvenience to the parties, or the unreasonableness of the terms'" (see case next cited). It does not differentiate between insurance and other contracts. [*Miller Brothers Construction Company* v. *Maryland Casualty Company,* 113 Conn. 504, 513, 155 Atl. 709 (1931)] Many of the cases already cited, of course, deal with problems in construction; but, at this point, with the observation that an instrument should always be construed as an integrated whole (and *a fortiori* the clauses of one integrated sentence such as Condition "B" of application and receipt), every effort being made to give every part effect, we simply cite these as illustrative of the court's failure to follow the authorities and above all, of course, Connecticut decisions.

Whitaker v. *Cannon Mills Company,* 132 Conn. 434, 440, 45 Atl. (2) 120 (1945);

Porto v. *Metropolitan Life Insurance Company,* 120 Conn. 196, 200, 180 Atl. 289 (1935);

Standard Fur Cutting Co. v. *Caledonian Insurance Company,* 113 Conn. 108, 112-113, 154 Atl. 153 (1931);

Eastern Bridge & Structural Co. v. *Curtis Building Co.,* 89 Conn. 571, 576, 94 Atl. 921 (1915);

Williams v. *Union Central Life Insurance Company,* 291 U. S. 170, 180 (1933);

Carpenter v. *Continental Casualty Company,* 95 Fed. (2) 634, 639 (C. C. A. 8, 1938);

Equitable Life Assurance Society of the United States v. *Deem,* 91 Fed. (2) 569, 575 (C. C. A. 4, 1937);

Rocci v. *Massachusetts Accident Company,* 222 Mass. 336, 343, 110 N. E. 972 (1916);

New York Life Insurance Company v. *Veit, et al.,* 294 N. Y. 222, 227, 62 N. E. (2) 45 (1945).

The *Williams* case, decided by this Court, is perhaps of some added interest here in view of the lower court's

claim that the petitioner, by virtue of Condition "B" (*supra,* p. 5) [no mention being made of Conditions "H" and "F" (*supra,* p. 5)], sought to impose upon words an "esoteric significance", intelligible only to the craft of insurers! (12 Life Cases, p. 424). Condition "B" is, compared with many an insurance clause, simplicity itself; nor is it claimed that the two provisos of this particular clause were not clearly put.

In the *Standard Fur Cutting* case, the Connecticut Supreme Court of Errors, in speaking of the general rule which favors an assured where a real ambiguity is present, said that it *"cannot be invoked to change the nature of the contract or nullify the insured's express and unequivocal agreement"* (p. 113; italics supplied).

In the *Eastern Bridge & Structural Co.* case, the same court said (p. 576) that construction of the whole instrument is requisite and also:

> "Where two clauses which are apparently inconsistent may be reconciled by any reasonable construction, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions."

3. Insurability of the Applicant Under the Petitioner's Rules Was Not Established by the Respondent.

It cannot possibly be said that the applicant was insurable under the petitioner's rules and that, but for his death, he would have received a policy "for the amount and on the plan applied for without modification" since, as appears from unchallenged facts found by the District Court, the respondent did not discharge her burden of proof.

This is true if for no other reason than her failure to show that Lincoln, the petitioner's reinsurer, would have reinsured for $5000, principal sum, and "on the plan applied for without modification", had it ever had the ap-

plication referred to it—which, as found, it never did. Yet *under the petitioner's rules,* compliance with all of which was a prerequisite to liability under Condition B (*supra,* p. 5) even as it was rewritten by the Circuit Court of Appeals, no policy "for the amount and on the plan applied for without modification" (and anything less would have been a legal rejection of the application) would have been issued by it in absence of such an approval by Lincoln.

The facts relating to insurability and the question of reinsurance, stated *supra* at pages 6-8, to which reference is respectfully made, need no repetition here. The applicant's conduct subsequent to execution of the application, as already pointed out, is pertinent on the subject not only of reformation but of insurability as well. The facts on that conduct, to which reference is also respectfully made, appear *supra* at pages 4, 7, 21-22.

The Circuit Court of Appeals arbitrarily disregarded these record facts on insurability. It also arbitrarily disregarded authorities cited to it on the effect of an applicant's rendering himself uninsurable subsequent to his signing an application, which Connecticut would doubtless follow, and which are these:

Stipcich v. *Metropolitan Life Insurance Company,* 277 U. S. 311, 315-318 (1928);

Gabbett v. *Connecticut General Life Insurance Company,* 303 Mass. 433, 435-437 (1939);

Goldstein v. *New York Life Insurance Company,* 162 N. Y. S. 1088, 176 App. Div. 813 (1917), aff. 227 N. Y. 575, 124 N. E. 898 (1919);

Polachek v. *New York Life Insurance Company,* 263 N. Y. S. 230 (1933), aff. 268 N. Y. S. 995 (1934);

Harris v. *Security Mutual Life Insurance Company,* 130 Tenn. 325, 170 S. W. 474 (1914).

CONCLUSION.

In view of the foregoing considerations, it is respectfully submitted that this Court grant the writ of certiorari prayed in the petition to which this brief is annexed.

Respectfully submitted,

WALLACE W. BROWN,
Attorney for Petitioner.

Hartford, Connecticut,
May 16, 1947.

APPENDIX.

Relevant Clauses of Application;
Also Temporary Receipt in Full

The text of the relevant clauses in the application, described on page 5 of the petition, *supra,* is as follows:

> "IT IS UNDERSTOOD AND AGREED THAT: . . . B. If the first premium or installment thereof above stated was paid when this application was signed, and if the Company is satisfied that on the date of the completion of Part B of this application I was insurable in accordance with the Company's rules for the amount and on the plan applied for without modification, and if this application, including said Part B, is, prior to my death, approved by the Company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B, but, if this application so provides, such insurance shall be in force as of the date of issue of the policy. . . . F. The Company reserves the right to require other evidence of insurability satisfactory to it, in addition to the information contained in this application. . . . H. If within sixty days from the date of Part B of this application it is not approved as aforesaid, or if the Company does not give notice of action thereon, the application shall be deemed to have been declined."

The temporary receipt, also described on page 5 of the petition, is as follows:

> "THIS FORM IS A TEMPORARY RECEIPT AUTHORIZED BY THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON, MASS., FOR PREPAYMENT OF THE FIRST PREMIUM WITH APPLICATION FOR NEW INSURANCE AND IS TO BE SURRENDERED IN EXCHANGE FOR THE OFFICIAL RECEIPT.

Received from JAMES A. GAUNT, JR. who has this day signed an application to the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY for a policy of insurance on his (or her) life for $15,000 on the END AGE 85 Plan, the sum of SEVENTY-NINE 05/100 Dollars, being the amount of the first QUARTERLY premium on such policy; in consideration whereof it is understood and agreed that if the Company is satisfied that on the date of the completion of Part B of said application, the applicant was insurable in accordance with the Company's rules for the amount and on the plan applied for without modification, and if said application, including said Part B, is, prior to the applicant's death, approved by the Company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B, but if said application so provides, such insurance shall be in force as of the date of issue of the policy. If within sixty days from the date of Part B of said application it is not approved as aforesaid, or if the Company does not give notice of action thereon, the premium so paid will be returned upon the surrender of this receipt.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
By M. KELMAN Agent

DATED AT 8/3/43 19
Form 156A-O-39."